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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 JENNIFER ROBERSON

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE,
Commissioner of Social Security

15 Defendant.
16

No. SACV 09-1243 AGR

MEMORANDUM OPINION AND ORDER

17 Plaintiff Jennifer Roberson ("Roberson") filed a Complaint on November 4, 2009.
18 Pursuant to 28 U.S.C. § 636(c), the parties filed Consents to proceed before Magistrate
19 Judge Rosenberg on December 1 and 23, 2009. (Dkt. Nos. 8, 10.) On July 13, 2010,
20 the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The Court
21 has taken the matter under submission without oral argument.

22 Having reviewed the entire file, the Court affirms the decision of the
23 Commissioner.

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I.

PROCEDURAL BACKGROUND

On February 27, 2007, Roberson filed an application for supplemental security income based on disability. Administrative Record (“AR”) 9.¹ She alleged a disability onset date of April 30, 2005. *Id.* The application was denied initially and on reconsideration. *Id.* Roberson requested a hearing before an Administrative Law Judge (“ALJ”). AR 78. On October 30, 2008, an ALJ conducted a hearing at which Roberson, a medical expert, and a vocational expert (“VE”) testified. AR 29-57. On May 11, 2009, the ALJ issued a decision denying benefits. AR 9-16. On June 3, 2009, Roberson requested that the Appeals Council review the decision denying benefits. AR 5. On September 11, 2009, the Appeals Council denied the request for review. AR 1-3. This action followed.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

In this context, “substantial evidence” means “more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner’s decision, the Court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. Where the evidence is

¹ Roberson previously filed an application for supplemental security income payments on March 27, 2006. AR 9. The application was denied and Roberson did not request reconsideration. *Id.*

1 susceptible to more than one rational interpretation, the Court must defer to the decision
2 of the Commissioner. *Moncada*, 60 F.3d at 523.

3 III.

4 DISCUSSION

5 **A. Disability**

6 A person qualifies as disabled and is eligible for benefits, "only if his physical or
7 mental impairment or impairments are of such severity that he is not only unable to do
8 his previous work but cannot, considering his age, education, and work experience,
9 engage in any other kind of substantial gainful work which exists in the national
10 economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333
11 (2003).

12 **B. The ALJ's Findings**

13 The ALJ found that Roberson has the following severe impairments: back injury
14 with bulging disc and headaches. AR 11. She has the residual functional capacity
15 ("RFC") "to lift and carry twenty pounds occasionally and ten pounds frequently." AR 13.
16 She can "stand and/or walk for six hours out of an eight-hour workday [and] sit for six
17 hours out of an eight-hour workday. Pushing and/or pulling are unlimited other than lift
18 and carry. [She] is limited to occasional postural limitations except for frequent climbing
19 of stairs and never crawling. Environmentally, [she] needs to avoid concentrated
20 exposure to extreme cold, avoid moderate exposure to vibration and void [sic] all
21 exposure to unprotected heights and moving machinery." *Id.* The ALJ found that
22 Roberson is capable of performing past relevant work as a cashier as actually and
23 generally performed. AR 15.

24 **C. Examining Physician**

25 Roberson contends the ALJ improperly rejected the opinion of an examining
26 physician in Orthopaedic Surgery. Roberson argues that the examining physician's
27 opinion indicates she meets or equals Listing 1.04A.
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1 The examining physician saw Roberson on May 7, 2007. AR 543. She had
 2 markedly restricted range of motion of the lumbar spine, and pain with extremes of
 3 movement. Straight leg raising was positive. She had normal reflexes, motor function
 4 and sensation. *Id.*

5 The examining physician's opinion does not constitute substantial evidence that
 6 Roberson meets or equals Listing 1.04A.² The opinion does not indicate "motor loss
 7 (atrophy with associated muscle weakness or muscle weakness) accompanied by
 8 sensory or reflex loss," as required by the listing. Contrary to Roberson's argument, the
 9 ALJ did not misrepresent the evidence by stating no examining physician reported
 10 findings which meet or equal a listing. AR 13. Any error was harmless. *Stout v.*
 11 *Comm'r of the Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); see also *McLeod*
 12 *v. Astrue*, 2011 U.S. App. LEXIS 2346, *11-*14 (9th Cir. Feb. 4, 2011) (party challenging
 13 agency determination has burden to show prejudice resulted from alleged error).

14 **D. Equivalency to Listing 1.04A**

15 At step three, the claimant bears the burden of demonstrating that her
 16 impairments are equivalent to a listed impairment that the Commissioner acknowledges
 17 are so severe as to preclude substantial gainful activity. *Bowen v. Yuckert*, 482 U.S.
 18 137, 141, 146 n.5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). "If the impairment meets or
 19 equals one of the listed impairments, the claimant is conclusively presumed to be
 20 disabled. If the impairment is not one that is conclusively presumed to be disabling, the
 21 evaluation proceeds to the fourth step." *Id.* at 141; *Tackett v. Apfel*, 180 F.3d 1094,
 22 1099 (9th Cir. 1999); 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

25 ² Listing 1.04A, "Disorders of the Spine," requires "[e]vidence of nerve root
 26 compression characterized by neuro-anatomic distribution of pain, limitation of motion of
 27 the spine, motor loss (atrophy with associated muscle weakness or muscle weakness)
 28 accompanied by sensory or reflex loss and, if there is involvement of the lower back,
 positive straight-leg raising test (sitting and supine)." 20 C.F.R. Pt. 404, Subpt. P, App.
 1, § 1.04A.

1 “The listings define impairments that would prevent an adult, regardless of his
2 age, education, or work experience, from performing *any* gainful activity, not just
3 ‘substantial gainful activity.’” *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S. Ct. 885, 107
4 L. Ed. 2d 967 (1990) (citation omitted, emphasis in original). “For a claimant to show
5 that his impairment matches a listing, it must meet *all* of the specified medical criteria.
6 An impairment that manifests only some of those criteria, no matter how severely, does
7 not qualify.” *Id.* at 530 (emphasis in original).

8 “To *equal* a listed impairment, a claimant must establish symptoms, signs and
9 laboratory findings ‘at least equal in severity and duration’ to the characteristics of a
10 relevant listed impairment, or, if a claimant’s impairment is *not* listed, then to the listed
11 impairment ‘most like’ the claimant’s impairment.” *Tackett*, 180 F.3d at 1099 (emphases
12 in original); 20 C.F.R. § 404.1526. “‘Medical equivalence must be based on medical
13 findings.’ A generalized assertion of functional problems is not enough to establish
14 disability at step three.” *Tackett*, 180 F.3d at 1100 (citation omitted).

15 “An ALJ must evaluate the relevant evidence before concluding that a claimant’s
16 impairments do not meet or equal a listed impairment. A boilerplate finding is insufficient
17 to support a conclusion that a claimant’s impairment does not do so.” *Lewis v. Apfel*,
18 236 F.3d 503, 512 (9th Cir. 2001).

19 The ALJ found that “[t]he record does not report the existence of any functional
20 limitations and or diagnostic test results, which would suggest that the impairments meet
21 or equal the criteria of any specific listing.” AR 13. In addition, the ALJ noted that no
22 treating or examining physician had reported findings that met or equaled a listing, and
23 such findings were not indicated by the medical evidence of record, as affirmed by the
24 medical expert. *Id.* The ALJ specifically considered Listing 1.04A. *Id.*

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1 Roberson argues that she meets or equals Listing 1.04A based on the opinion of
2 an examining physician in orthopaedic surgery. Her argument is rejected for the
3 reasons discussed above.³

4 Substantial evidence supports the ALJ's findings. The ALJ reviewed and weighed
5 the medical evidence. AR 11-15. The ALJ cited the opinion of examining physician Dr.
6 Altman, who found MRI evidence of mild degenerative disc disease and concluded
7 Roberson could perform medium work. AR 12. The ALJ also cited objective medical
8 evidence (consisting of x-rays, MRI results and a nerve conduction study) that indicated
9 mild degenerative disc disease, mild spondylosis and mild S1 radiculopathy. AR 12,
10 540, 562, 565. The ALJ found the medical expert's opinion that Roberson did not meet
11 or equal a listing was consistent with the objective medical evidence. AR 11-13. The
12 ALJ did not err.

13 **E. Treating Physician**

14 Roberson contends that the ALJ failed to provide specific and legitimate reasons
15 for rejecting a temporary disability opinion of treating physician Dr. Schilling. Roberson
16 concedes that the period of temporary disability, February 7, 2003 until April 15, 2003, is
17 "somewhat remote" in time. JS 17. Nevertheless, Roberson argues that the ALJ's
18 decision might have been different if Dr. Schilling's opinion as to temporary disability had
19 been considered.

20 An opinion of a treating physician is given more weight than the opinion of non-
21 treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). When a treating
22 physician's opinion is contradicted by another doctor, "the ALJ may not reject this
23 opinion without providing specific and legitimate reasons supported by substantial
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25 ³ Roberson relies on *Marcia v. Sullivan*, 900 F.2d 172 (9th Cir. 1990), to support
26 her contention that the ALJ did not consider equivalence. JS 13. Roberson's reliance
27 on *Marcia* is misplaced. In *Marcia*, the claimant presented medical findings and
28 evidence regarding the combination of his impairments in an effort to establish
equivalence. *Marcia*, 900 F.2d at 176. Here, Roberson did not present evidence of
medical equivalence.

1 evidence in the record. This can be done by setting out a detailed and thorough
2 summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
3 and making findings.” *Id.* at 632 (citations and quotations omitted).

4 The ALJ considered that, in a permanent and stationary report, Dr. Schilling
5 diagnosed Roberson with lumbar sprain/strain, lumbar discopathy, and lumbar
6 radiculopathy, and limited her to light work as of August 22, 2003. AR 11, 522. Dr.
7 Schilling’s opinion is consistent with the ALJ’s RFC and there is no indication the ALJ
8 rejected Dr. Schilling’s opinion. Roberson’s argument that the ALJ should have
9 discussed Dr. Schilling’s prior opinion that Roberson was temporarily disabled between
10 February 7, 2003 and April 15, 2003 is not well taken. AR 528. There was no need for
11 the ALJ to address a period of temporary disability that lasted less than 12 months, and
12 occurred prior to the alleged onset date and prior to the same physician’s opinion that
13 Roberson was capable of light work as of her permanent and stationary date. See
14 *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (ALJ is not
15 required to discuss evidence that is neither significant nor probative). Put another way,
16 the ALJ’s disability determination remains valid even assuming Dr. Schilling’s prior
17 opinion of temporary disability is fully accepted.⁴ See *McLeod*, 2011 U.S. App. LEXIS
18 2346 at *11-*14; *Stout v. Commissioner*, 454 F.3d 1050, 1055 (9th Cir. 2005) (harmless
19 error). It is clear on this record that any error was harmless.

20 **F. Past Relevant Work**

21 Roberson contends that the ALJ erred by failing to discuss the actual physical and
22 mental demands of her past relevant work.

23 “At step four of the sequential analysis, the claimant has the burden to prove that
24 he cannot perform his prior relevant work ‘either as actually performed or as generally

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26 ⁴ Roberson’s argument that the previous period of temporary disability lends
27 credence to Dr. Tajik’s opinion of disability four years later is not sufficient to establish
28 prejudicial error. Roberson does not challenge the ALJ’s reasons for discounting Dr.
Tajik’s opinion. Moreover, Dr. Schilling opined that Roberson could perform light work
after she was permanent and stationary.

1 performed in the national economy.” *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d
2 1155, 1166 (9th Cir. 2008) (citation omitted). “Although the burden of proof lies with the
3 claimant at step four, the ALJ still has a duty to make the requisite factual findings to
4 support his conclusion.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The ALJ
5 must make “specific findings as to the claimant’s residual functional capacity, the
6 physical and mental demands of the past relevant work, and the relation of the residual
7 functional capacity to the past work.” *Id.* at 845; Social Security Ruling 82-62;⁵ see also
8 20 C.F.R. §§ 404.1520(e), 416.920(e). The ALJ is not required to make explicit findings
9 as to whether a claimant can perform past relevant work both as generally performed
10 and as actually performed. *Pinto*, 249 F.3d at 845.

11 The ALJ found that Roberson could return to her past relevant work as a cashier,
12 both as actually and generally performed. AR 15. The ALJ stated that he relied upon
13 the VE’s testimony that the requirements of the cashier job were consistent with
14 Roberson’s RFC. *Id.* Prior to the VE’s testimony, the ALJ questioned Roberson about
15 the requirements of her cashier jobs. AR 52-54. The VE testified that both cashier
16 positions were light, unskilled jobs. AR 55; see DOT 211.462-010; DOT 311.472-010.
17 The VE testified that a person with Roberson’s RFC could perform her past relevant
18 work as a retail cashier or a fast food cashier. AR 15, 55. Roberson’s descriptions of
19 her prior work (see AR 53-54) and the VE’s opinion, which in turn relied on specific job
20 classifications in the DOT, constitute substantial evidence supporting the ALJ’s
21 determination. See *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (claimant’s
22 testimony about past relevant work is “highly probative”); *Pinto*, 249 F.3d at 845-46 (“the
23 best source for how a job is generally performed is usually the Dictionary of
24 Occupational Titles”). Roberson does not identify any inconsistency between the ALJ’s
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26 ⁵ Social Security rulings do not have the force of law. Nevertheless, they “constitute
27 Social Security Administration interpretations of the statute it administers and of its own
28 regulations,” and are given deference “unless they are plainly erroneous or inconsistent
with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 RFC and her ability to perform her past relevant work as actually performed according to
2 her description or as generally performed according to the DOT job classifications. The
3 ALJ did not err.

4 **IV.**

5 **ORDER**

6 IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

7 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order
8 and the Judgment herein on all parties or their counsel.

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10 DATED: March 30, 2011



ALICIA G. ROSENBERG
United States Magistrate Judge